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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CITY OF ALBUQUERQUE, et al.

Petitioners,

-vs-

JOSEPH N. RIGGS, III, et al.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

The complaint in this case was pled on information and belief because of the secrecy with which defendants maintained their intelligence files.

Absent any pre-filing discovery, the allegations of the complaint were made consistent with other facts known to the community, including the prior unlawful surveillance by APD Intelligence Unit officers of a well-known civil rights activist and attorney and the information contained in the audit report of former New Mexico Supreme Court Chief Justice William Riordan. According to Justice Riordan's audit report, the impermissibly maintained intelligence files included information acquired and kept for Albuquerque Police Department Intelligence Unit law enforcement officers' personal use and for political purposes with no legitimate law enforcement basis.

No discovery was permitted in the trial court to enable plaintiffs to make any particularized showing of actual harm in support of their complaint. The evidence produced for the district court's consideration supplementary to the allegations of the complaint in response to petitioners' Rule 12(b)(1) Motion to Dismiss for Lack of Standing was entirely information contained in the public record and included a videotape of Justice Riordan's presentation to the Albuquerque City Council in which he gave examples of the nature of the information in the files. Justice Riordan also said that some of the information had been made available by defendants to newspapers and television stations.

The complaint alleged that plaintiffs were the actual targets of defendants' allegedly unlawful surveillance activities and that they were a focus of defendants' continuing conduct, allegations which the United States Court of

Appeals for the Tenth Circuit held made this case "easily distinguishable" from Laird v. Tatum, 408 U.S. 1 (1972), the sole authority on which the district court had relied to dismiss plaintiffs' complaint. Riggs v. City of Albuquerque, 916 F.2d 582, 585 (10th Cir. 1990). In reversing the district court, the Circuit Court further relied upon this Court's ruling in Meese v. Keene, 481 U.S. 465 (1987), that "harm to a plaintiff's reputation in the community is a cognizable injury which affords a plaintiff standing to bring suit." Riggs, 916 F.2d at 585 (emphasis in original), citing Meese, 481 U.S. at 473-74.

Finally, the Circuit Court acknowledged the unique circumstances of this case, in light of the secrecy with which defendants maintained the intelligence files, to excuse plaintiffs from having alleged with more specificity the harm they have suffered from defendants' impermissible conduct. Riggs, 916 F.2d at 586-87, citing Palmer v. City of Chicago, 755 F.2d 560, 573 (7th Cir. 1985).

> As in Palmer, the lack of access to the investigative files in this case prevented plaintiffs from alleging with more specificity that they were targets of the alleged illegal investigations. Dismissal prior to discovery would be inequitable under these facts because plaintiffs have alleged a direct harm caused by defendants' actions.

916 F.2d at 587. Acknowledging the unique circumstances in the allegations of the complaint before it and following the

Seventh Circuit Court of Appeals' reasoning in Palmer, the Circuit Court reversed and remanded to permit discovery.[1]

II. REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit is consistent with standing decisions of this Court and does not conflict with decisions of other circuits. The Circuit Court decision correctly identified the presence in plaintiffs' complaint of sufficient allegations of particularized harm, and further properly recognized in the unusual circumstances of this case "[t]he importance of permitting discovery when crucial information is in the exclusive control of the defendant... ." Riggs, 916 F.2d at 586.

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[1] The Circuit Court was not unmindful of the availability of a Rule 56 summary judgment motion as a means by which defendants might test the sufficiency of plaintiffs' action after discovery has been permitted. Cf., Riggs, 916 F.2d at 586. The practical effect of defendants' deliberate public burning of 34 of the 35 boxes of investigative files which were a subject of this action upon plaintiffs' ability to withstand summary judgment was not addressed by the Circuit Court other than for it to note that the continued existence of the 35th box, and plaintiffs' allegations of defendants' continuing unlawful conduct, forestalled a finding of mootness. Riggs, 916 F.2d at 584, 584 n.2.

A. Plaintiffs' Allegations of Harm to their Personal, Political and Professional Reputations and that They Were the Actual Targets of Unlawful Surveillance Activities Were Sufficient on the Issue of Standing; in the Unusual Circumstances of this Case, the Circuit Court's Ruling Is Not in Conflict With the Decisions of this Court or Other Circuit Courts.

The Circuit Court relied solely upon the allegations of the complaint to find plaintiffs had sufficiently alleged the requisite particularized allegations of fact necessary to support standing to sue. Riggs, 916 F.2d at 584, 584 n.3. The Circuit Court decision is not in conflict with other decisions addressing pleading requirements to support standing. The allegations made by the plaintiffs in United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) were not "nearly identical," as petitioners suggest, Petition, at 8-9, but distinctly different from those alleged in the complaint in this case. In Reagan, plaintiffs alleged a "fear of being subjected to illegal surveillance," and their concern for "the immediate threat of being targeted for surveillance, ..." 738 F.2d at 1377, 1378 (emphasis supplied). Here the allegation is one of focused injury and ongoing conduct. Moreover, in Reagan, the court suggested, in dicta, that "there is no reason why [plaintiffs] would be unable to challenge any illegal surveillance of them when (and if) it occurs," id., at 1380 (emphasis supplied), precisely the factual allegations in the complaint in this case.

In Meese v. Keene, 481 U.S. 465 (1987), this Court found allegations of harm to a plaintiff's reputation to be a sufficiently cognizable injury to afford plaintiff standing to bring suit. Id., at 473-74. Consistent with Meese, the Circuit Court correctly found plaintiffs had alleged in their complaint more than merely a chilling of their first amendment rights, but also "harm to their personal, political, and professional reputations in the community. More importantly, the plaintiffs in this case alleged that they were the actual targets of the illegal investigations. Thus, Laird is easily distinguishable... ." Riggs, 916 F.2d at 585 (emphasis supplied).

The Circuit Court properly applied the teachings of this Court to find that the allegations of the complaint, taken as true and construed in favor of the plaintiffs on a motion to dismiss for lack of standing, see, Pennell v. City of San Jose, 485 U.S. 1, 7 (1988), sufficiently alleged injury in fact and therefore presented a justiciable case or controversy for adjudication in the federal district court.

B. Where Crucial Information is Solely in the Hands of Defendants, the Decision of the United States Court of Appeals for the Tenth Circuit to Permit Discovery Does Not Conflict With Other Circuit Courts' Decisions; Because the Factual Allegations in Plaintiffs' Complaint Markedly Differ from Complaints in Other Cases, and the Rulings of the Respective Circuit Courts are Fact Specific, no Conflict Between the Circuit Courts' Decisions Exists.

In seeking to manufacture a conflict between the Circuit Court's decision below and rulings in other Circuit Courts

and in this Court, petitioners fail to acknowledge the unusual circumstances in this case where "crucial information is in the exclusive control of the defendant," Riggs, 916 F.2d at 586, and where the district court's dismissal of the complaint came without permitting plaintiffs any discovery. Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987), on which petitioners rely, was specifically discussed by the Circuit Court, which acknowledged that in other circumstances, discovery might not be required on the standing issue, but that here, on a motion to dismiss and not at summary judgment, discovery was "particularly appropriate."[2] Riggs, 916 F.2d at 586. Because of the unusual facts alleged in plaintiffs' complaint, the Circuit Court's ruling is not in conflict with other circuits or with this Court.

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[2] The other cases petitioners cite were ruled on at a later stage than a motion to dismiss, cf., Sinclair v. Schriber, 916 F.2d 1109 (6th Cir. 1990) (summary judgment); Wade v. Goodwin, 843 F.2d 1150 (8th Cir.) cert. denied, 488 U.S. 854 (1988) (same); Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987); Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (ruling following non-jury trial), or involved circumstances factually different than those alleged here, i.e., no claim as to the existence of defendants' secret activities precluding more specific pleading, Haase, supra; Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), vacated as moot 484 U.S. 806 (1987), or no claim of injury in fact or ongoing unlawful conduct. United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (action based on mere fear of surveillance and speculative threat of injury).

The Circuit Court's ruling is in harmony with the decisions in two other circuits, one of which the Circuit Court relied on in making its decision and neither of which petitioners bring to this Court's attention in seeking a writ of certiorari. The Circuit Court quoted extensively from Palmer v. City of Chicago, 755 F.2d 560, 573 (7th Cir. 1985), in underscoring the importance of discovery "when crucial information is in the exclusive control of the defendants... ." Riggs, 916 F.2d at 586.[3] The Second Circuit Court of Appeals has recently addressed similar issues, rejecting defendants' attack on plaintiffs' standing to sue in light of the secrecy of defendants' activities. New York State National Organization for Women v. Terry, 886 F.2d 1339, 1348 (2d Cir. 1989).

The Tenth Circuit does not stand alone, but is in harmony with the other two circuit courts which have addressed issues of standing in circumstances like these where the secrecy of defendants' activities and defendants' exclusive possession of the information essential in proving the injury prevents more specific pleading in advance of discovery.

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[3] The Circuit Court's reliance on Palmer is in harmony with this Court's recognition in Warth v. Seldin, 422 U.S. 490, 501-02 (1975) requiring that plaintiffs have the opportunity to make the requisite allegations required to support standing to sue. Compare, Warth v. Seldin, supra with Palmer, 755 F.2d at 573, quoted in Riggs, 916 F.2d at 586-87. See also, Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988).

CONCLUSION

Public policy does not justify granting petitioners' request for a writ of certiorari. Together with the Second and Seventh Circuits, the Tenth Circuit recognizes the inequity of barring discovery where defendants' secret activities makes more specific pleading impossible.

Plaintiffs do not seek "intrusive discovery into the operations of a police agency," Petition, at 9, but the opportunity, after discovery, to secure declaratory and injunctive relief based on the unlawful surveillance activities of a police intelligence unit engaged in conduct that has no legitimate law enforcement purpose.[4]

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[4] The relief plaintiffs sought in their Complaint was not new or novel in the context of "Red Squad" cases such as this one, but was patterned after relief successfully obtained in other cases attacking impermissible political surveillance activities conducted by local and national law enforcement agencies. See, Chevigny, Politics and Law in the Control of Local Surveillance, 69 Cornell L. Rev. 735, 747-67 (New York, Chicago and Memphis), 767-77 (Los Angeles, Michigan and Detroit) (1984). Cf., Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981) (FBI); Alliance to End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982), rev'd on other grounds, 742 F.2d 1007 (7th Cir. 1984) (Chicago Police Department); Handschu v. Special Services Division, 605 F. Supp. 1384, 1417-24 (S.D.N.Y. 1985), aff'd, 787 F.2d 828 (2d Cir. 1986) (New York City Police Department).

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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